IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 23RD NOVEMBER 2007 / 2ND AGRAHAYANA 1929

AR.No. 37 of 2007()

PETITIONER :

M/S. RUBEK BALLOONS PVT. LTD.,
REPRESENTED BY ITS MANAGING DIRECTOR,
K.THULASIDHARAN NAIR.

BY ADV. SRI.P.V.MADHAVAN NAMBIAR
SRI.M.A.KHADIRKUNJU

RESPONDENTS:
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1. P.K.RAMACHANDRAN,
ENGINEERING CONTRACTOR, DEEPA MANDIR,
KARUVELIPPADI, COCHIN-682 005.

2. MR. JUSTICE K.JOHN MATHEW,
FORMER JUDGE, KATTAPURATH, VEEKSHANAM ROAD,
ERNAKULAM NORTH, COCHIN-682 018.

BY ADV. SRI.K.L.VARGHESE
SMT.SANTHA VARGHESE

THIS ARBITRATION REQUEST HAVING BEEN FINALLY HEARD ON 23/11/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE, J.

A.R. No. 37 OF 2007

Dated this the 23rd day of November, 2007

JUDGMENT

The applicant, a private limited company, had engaged the 1st respondent as engineering contractors for the execution of civil works for the construction of their factory building. Certain disputes have arisen between them and invoking the arbitration clause in Annexure A1 agreement the applicant seeks appointment of an independent and impartial arbitrator under section 11(5) of the Arbitration and Conciliation Act read with the scheme for appointment of arbitrators by the chief justice of the High court of Kerala.

2. Annexure A1 is copy of the memorandum of agreement dt.22.10.03 executed between the petitioner and the 1st respondent regarding execution of the work. Annexure A2 is copy of the general conditions of contract(relevant portions only). The petitioner points out that bill for the work originally entrusted to respondent has been placed on 17.03.05 and he has taken the stand that additional work will be undertaken by him only after the amounts due as per the certificate of the architect are paid to him. The 1st respondent issued a letter to the petitioner on 02.04.05. To that letter, the applicant has sent reply through an advocate informing that payments can not be made without

evaluating the work and without detecting damages caused to the applicant due to defects, if any, in the quality of the work done and delay caused in the matter of completing the work. It is submitted that disputes arose between the parties thereafter and the 1st respondent issued another notice, Annexure A3, on 20.09.05 claiming an amount of Rs.63,81,203/- including amounts due as per the original agreement and for additional works stated to have been done. It is submitted that the applicant got the work evaluated by an engineer by name Hameed and it was revealed that there were defects and shortages in the work done by the 1st respondent and therefore Annexure A4 letter was sent to the 1st respondent requesting to reduce the claims by Rs.26.19 lakhs. On receiving Annexure A4, the contractor, 1st respondent, sent Annexure A5 letter demanding settlement of the dues on the same date. Annexure A5 letter was followed by Annexure A6 letter dt.24.10.06 and in Annexure A6, it was stated that, the 1st respondent will be constrained to move the court. The applicant contends that the tenor of Annexure A6 is to be understood in the context that the provisions for settlement of disputes by arbitration as shown in the agreement have been given by the 1st respondent and the 1st respondent wanted to resort to traditional litigation. As reply to Annexure A6, the applicant sent Annexure A7 dt.10.04.07 to the 1st respondent and in Annexure A7 it is stated that the

applicant is prepared to settle the account of 1st respondent and to pay the amounts found due on settlement of accounts only after the 1st respondent rectifies the defects in the work carried out by him under Annexure A7. The 1st respondent contractor was called upon to rectify the mistakes and to make good the deficiency and to complete the work satisfactorily on account of what was described as cordial relationship between the parties. The applicant submits that for facilitating an amicable settlement of the disputes, a discussion was held between the parties on 20.07.07 in the premises of the applicant company and Annexure A8 is copy of the minutes of the said meeting. It is pointed out in that meeting that the 1st respondent was represented by his son-in-law, Chandra Mohan who informed the applicant that he is not in a position to give immediate reply and therefore sought time for submission of proposal. The applicant relies on Annexure A8(a) relevant page of the Dak Despatch Register of the company to show that the copy of the minutes was forwarded to the 1st respondent. Applicant submits that on 10.08.07 a panel of three arbitrators was forwarded to the 1st respondent so as to enable the 1st respondent to choose one among them, according to Clause 43 of Annexure A2. Annexure A9 is copy of that letter. It is stated that after Annexure A9 letter had been forwarded by the applicant, they received Annexure A10

letter dt.09.08.07 from the 1st respondent's advocate. It is stated that under Annexure A10 the 1st respondent has appointed Justice K.John Mathew as the sole arbitrator for setting the disputes between the parties. It is pointed out that though Annexure A10 is seen dt.09.08.07, it has been actually received by the applicant company only on 14.08.07. It is submitted that the appointee was not one among the three persons mentioned in Annexure A9. It is also pointed out that so far no reply has been sent by 1st respondent to Annexure A9, it is claimed that the applicant was all along expecting that the 1st respondent will be choosing an arbitrator from the panel shown in Annexure A9. The applicant has produced Annexure A11 received by the applicant from justice K.John Mathew, 2nd respondent stating that he has been appointed as arbitrator for settlement of the dispute between the parties and informing that the first sitting of the arbitration will be held in his office at Veekshanam road on 27.09.07.

3. It is contended that the appointment of the 2nd respondent by the 1st respondent is not in accordance with the provisions under the agreement and therefore the arbitration cannot be permitted to be proceeded with by the 2nd respondent. The appointment being not in accordance with Clause 43 of Annexure A2 and Clause 20 of Annexure A1, the same cannot be said to be in accordance with law. The 1st

respondent is bound to choose one among the three persons mentioned in Annexure A9 since his appointment procedure agreed upon between the parties has failed. The applicant is invoking Section 11(5) of the statute and hence the A.R. with the following prayers:

a) to appoint a sole arbitrator from the list already submitted in Annexure A9 to adjudicate the dispute between the petitioner and respondent No.1;

b) declare that the appointment of the 2nd respondent as arbitrator made by the respondent No.1 as null and void;

c) to issue an interim stay of the proceedings as arbitrator by 2nd respondent intimated by the 2nd respondent as per Annexure A11 as the appointment is in violation of the relevant clauses of the agreement and questioned in the Arbitration Request, till the disposal of that request;

4. A detailed counter affidavit has been filed by the 1st respondent on 03.10.07 followed by another counter affidavit on 08.10.07. It is contended by the 1st respondent through the counter affidavit dt.03.10.07 that the arbitration request is not maintainable since Section 11(5) of Arbitration and Conciliation Act can have application only in cases where there is no agreement between the parties regarding the procedure for appointment of an arbitrator. In the instant case there is an agreement between the parties regarding appointment of arbitrator and therefore Section 11(5) cannot have any application. Referring to Clause 43 of the agreement which is an arbitration clause, it is

contended that under that clause it was obligatory that the employer(the petitioner company) sent within 30 days of receiving notice for the appointment of arbitrator by the 1st respondent contractor, a panel of three names, so that the 1st respondent could select one among them as the sole arbitrator and communicate the same to the petitioner within 30 days of receiving the names.

5. It is submitted that as disputes arose between the parties, the respondent invoked arbitration clause by their lawyers notice dt.25.5.07, Ext.R1(a), requesting the petitioner to forward a panel of three persons of integrity, caliber and experience. There was no response to Ext.R1 (a) within the stipulated time and therefore the respondent sent Ext.R2 (b) notice dt.04.07.07 notifying the names of three persons requesting the petitioner to select and appoint one among them as sole arbitrator. Even after Ext.R1(b), the petitioner failed to comply with the requirements and consequently as authorized in para 4 of the arbitration clause the respondents who were entitled to appoint one of the persons from the panel indicated in Ext.R1(b), appointed justice K.John Mathew as the arbitrator and communicated the decision to the petitioner by Annexure A10 notice. It is pointed out that Annexure A10 refers to all previous letters sent by the respondent to the petitioner. It is contended that the appointment of Justice Sri.K.John Mathew by the respondent is

fully in consonance with the arbitration agreement. The person appointed by the respondent is a retired judge of this court known for his integrity, caliber and fairness. It is submitted that the arbitrator so appointed has already entered upon reference and it is only just and fair that the learned arbitrator is allowed to continue the proceedings. Annexure R1(c), copy of the proceedings of the arbitrator on 27.9.07, is relied on in this regard.

6. The petitioner got the arbitration request amended and as per the amended arbitration request, the petitioner has invoked Section 11 (6) of the Arbitration Act for the appointment sought for. The respondent has filed a further counter affidavit on 08.10.07 also.

7. I have heard Sri.P.V. Madhavan Nambiar, learned counsel for the petitioner and Sri.K.L.Varghese, counsel for the respondent. They have addressed me extensively. My attention was drawn by Sri.Madhavan Nambiar to the various averments in the arbitration request and to various Annexures particularly to A4, A5, A6, A8, A10. Mr.Nambiar relied on the judgment of the Supreme Court in **Datar Switchgears Ltd. v. Tata Finance Ltd.** [(2000) 8 SCC 151]. Sri.K.L.Varghese per contra would resist the submissions of Mr.Nambiar and I must say very ably analyzing Section 11 of the Arbitration and

Conciliation Act meticulously. The learned counsel would place strong reliance on the judgment of the Supreme Court in **You One Engg. & Construction Co. Ltd v. National Highways Authority of India** [(2006) 4 SCC 372] and submit that conditions justifying invocation of the appointment procedure under Section 11(6) by a designated Judge has not been satisfied in this case.

8. Having considered the rival submissions addressed at the Bar, I do find merit in the submission of Mr.K.L.Varghese that the respondent was justified in appointing Justice Sri.K.John Mathew as the Arbitrator. At the same time considering the opposition of the applicant to the continuance of the proceedings already entered on by Justice Sri.K.John Mathew and the embarrassment which will be caused to that learned Judge by appointing him as arbitrator in spite of the applicant's opposition, I am inclined to appoint another retired Judge of this Court also known for learning, integrity and caliber. Disputes have concededly arisen between the parties and there is a valid arbitration agreement between the parties. It is in the interest of both the parties to have their claims and counter claims adjudicated in arbitration proceedings. The Arbitration Request will stand allowed. Hon'ble Justice Smt.K.K. Usha, retired Chief Justice of this Court is appointed as Arbitrator for

settlement of all the disputes which have arisen between the parties. She will enter on reference and pass award at her earliest. It is made clear that this judgment does not decide the merits of the contentions raised by the respondent regarding the maintainability of this Arbitration Request's. It does not decide the legality and correctness of appointment of Justice Sri.K.John Mathew as arbitrator either, though apparently that appointment was proper. The diffidence of the applicant to participate in the arbitration entered on by Justice John Mathew, in my opinion, was not justified. Nevertheless, I have proceeded to appoint another arbitrator only for the reasons already indicated and this judgment shall be a governing precedent in similar situations.

The Arbitration Request stands allowed as above. No costs.

PIUS C. KURIAKOSE, JUDGE

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